6

No. 4353

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WYATT LUMBER COMPANY, LTD.,
(a corporation),
Plaintiff in Error,

vs.

COOLEY HARDWOOD MANUFACTURING
COMPANY (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

R. CLARENCE OGDEN,
Standard Oil Building, San Francisco,
Attorney for Defendant in Error.

No. 4353

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WYATT LUMBER COMPANY, LTD., (a corporation),
Plaintiff in Error,

vs.

COOLEY HARDWOOD MANUFACTURING COMPANY (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

May it please the court:

It is the contention of this defendant in error that the writ in this case was sued out solely for the purpose of delaying justice and without any foundation in law or in conscience.

Plaintiff in error has wholly failed to support the writ or to attempt so to do by any brief complying with Rule 24, page 22, "Rules of the United States Circuit Court of Appeals for the Ninth Circuit."

The only brief filed is one less than four pages in length in which:

(a) No "concise abstract, or statement of the case" is presented.

(b) No separate specification of the errors relied upon and no statement of exception relied upon.

(c) No references to the pages of the record relied upon.

The judgment attacked by plaintiff in error is one upon verdict rendered by a jury after evidence presented both by plaintiff and defendant. No record of that evidence has been brought before this court. It must, therefore, be here presumed that all issues raised by the complaint and answer were determined in favor of plaintiff and are supported by the evidence. Those issues are:

A. As raised by the complaint and denied in answer.

1. That plaintiff and defendant are corporations.

2. That in June and July, 1922, R. H. Cooley entered into a written contract with defendant whereunder defendant agreed to deliver 500,000 feet of oak lumber to said R. H. Cooley, of certain grades at $85.00 per thousand feet for one grade and $64.00 per thousand feet for the second grade. Prices F. O. B. Oakland. Price to be settled for less 2% five days after delivery. Deliveries to commence about November, 1922, and continue thereafter at rate of sixty thousand feet per month. (Trans. pages 1-11.)

3. That R. H. Cooley assigned that contract to this plaintiff in November, 1922, of which assignment defendant was notified, and after such notification defendant delivered to plaintiff some thirty thousand five hundred feet of lumber as an act of ratification.

4. That thereafter the market price of oak lumber increased thirteen dollars per thousand feet F. O. B. Oakland.

5. That thereafter defendant refused to complete and at all times thereafter refused and failed to complete the contract to the damage of plaintiff in the sum of $5633.85.

(Trans. pages 11 to 12.)

B. As raised by the answer.

"That in making of said contract there was involved a relation of personal trust and a five days credit extended to R. H. Cooley and that defendant never agreed to or consented to said alleged assignment of said contract to plaintiff." (Trans. pages 54 and 55.)

For plaintiff to contend at this stage of the proceedings that the complaint is fatally defective, we respectfully submit, is frivolous in the extreme. To so contend, without any reference to the allegation in the answer above mentioned, is indicative of a lack of good faith.

An omitted allegation in the complaint may be aided by an averment of that fact in the answer, so

as to uphold a judgment thereon, even though a demurrer to the complaint for want of the fact had been erroneously overruled.

Daggett v. Gray, 110 Cal. 169;
Savings Bank v. Barrett, 126 Cal. 413;
Kreling v. Kreling, 118 Cal. 413;
Shenck v. Hartford Ins. Co., 71 Cal. 28;
De Flores v. Santa Cruz, 86 Cal. 191;
Burns v. Cushing, 96 Cal. 669;
Girvin v. Simon, 116 Cal. 604;
Booth v. Oakland Bank, 122 Cal. 19;
Flynn v. Ferry, 127 Cal. 648, 653;
Perkins v. Blauth, 163 Cal. 782.

For instance, where a complaint in replevin failed to aver that plaintiff was the owner or entitled to possession at the time the action was commenced, such defect is cured by an averment in the answer denying that plaintiff was the owner and/or entitled to the possession.

Flynn v. Ferry, supra.

In the instant case, if the complaint is silent upon the issue that defendant consented to the assignment of the contract, that issue was raised by the answer and decided by the verdict in favor of plaintiff.

But the complaint is not so silent. It is alleged:

> "That thereafter, on the 20th day of November, 1922, said R. H. Cooley assigned to this plaintiff said contract, and thereafter this plaintiff notified said defendant of said assignment; that thereafter said defendant delivered to this plaintiff at Oakland, California, the fol-

> lowing amounts of lumber and no other amounts;" etc. (Trans. p. 11.)

Where facts are alleged from which the ultimate fact can be inferred, a general objection to the complaint will not lie.

Allan v. Guaranty Oil Co., 176 Cal. 421, 426.

In that case the complaint "did not set forth an actual eviction." * * * "But it did allege facts showing the equivalent of an eviction."

Allan v. Guaranty Oil Co., supra, p. 426.

The complaint now before this honorable court alleged facts equivalent to a consent by defendant to the assignment, to wit: partial performance to the assignee after notice of the assignment.

> "The acts and conduct of a party to a contract, with knowledge of the fact that the contract has been assigned, may be such as to warrant the conclusion that the provision against the assignment has been waived."
>
> 5 C. J., 884 § 49;
>
> Staples v. Somerville, 176 Mass. 237;
>
> Moore v. Thompson, 93 Mo. A. 336;
>
> Brewster v. Hornellsville, 54 N. Y. S. 904;
>
> Camp v. Wiggins, 72 Iowa 643;
>
> Cheney v. Bilby, 74 Fed. 52.

The real question to be considered, ordinarily, is whether the contract under consideration is such as to bring it within the rule that contracts are not assignable where they involve such a relation of personal trust as to make that relationship of the

essence thereof. Upon this question plaintiff in error is silent. Such pretense that it makes in support of the writ is based upon the broad statement of the general doctrine without any reference to authorities or quotations from the record indicating that the contract here involved is such a contract. At the trial, however, it was contended that such was the case and one of the issues tried was whether after knowledge of the assignment defendant and plaintiff in error consented thereto. The verdict rendered includes a finding that such consent was given. With the evidence supporting such a finding unquestioned, we submit, the time and patience of this honorable court has been frivolously trespassed upon for no other reason than that of delay.

That frivolity of purpose is to be clearly seen in the second and only other point raised by plaintiff in error, to wit:

> "A pleading is to be construed most strongly against the pleader."

After verdict the contrary is the rule:

> Bates v. Babcock, 95 Cal. 479, 21 R. C. L. 467.

The Code of Civil Procedure provides (section 452):

> "*Pleadings to be liberally construed.* In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

This is a common law action and

> "contrary to the common law rule, every reasonable intendment and presumption under the rule of liberal construction must be made in favor of the pleader."
>
> 21 R. C. L., 466;
>
> United States v. Parker, 120 U. S. 89.

Commenting on a similar code section in Nevada the Supreme Court of the United States said:

> "The result of the decisions in that State seems to be that on a general demurrer the allegations of a complaint will be construed as liberally in favor of the pleader as, before the Code, they would have been construed after verdict for the plaintiff."
>
> United States v. Parker, supra.

The writ of error in this case sued out was accompanied by a supersedeas bond theretofore filed, a copy of the writ was not filed with the clerk of the court, until after the time permitted by law for perfecting the supersedeas. By that delay in filing the writ, the cause was prevented from coming before this honorable court during the October term, a delay was obtained by preventing plaintiff from executing its judgment until the effect of the supersedeas could be determined.

It is respectfully submitted, therefore, that the judgment of the District Court be affirmed, that pursuant to Rule 30 of this court, damages in addi-

tion to interest be awarded, and that this defendant in error be allowed its costs herein incurred.

Dated, San Francisco,
March 14, 1925.

Respectfully submitted,
R. Clarence Ogden,
Attorney for Defendant in Error.